

**“Reflections from five years as
the Legal Counsel of the United Nations”**

**Statement by Ms. Patricia O’Brien,
Under-Secretary-General for Legal Affairs,
The Legal Counsel
Tuesday, 9 July 2013, 3.30pm-5.00pm,
UNHQ, Conference Room A**

Excellencies,
Distinguished Delegates,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure to be here with you this afternoon to share with you some reflections on my role as Legal Counsel of the United Nations, and to discuss with you some of the issues that have arisen over the course of my tenure. This will probably be my last encounter with most of you in my capacity as Legal Counsel of the United Nations. In September, as you probably know, I will be representing Ireland as Permanent Representative to the UN in Geneva.

Allow me at the outset to express my sincere gratitude to the Asian African Legal Consultative Organization (AALCO) and its Permanent Observer to the United Nations in New York, Ambassador Roy Lee, for your support over the course of my tenure. AALCO plays an important role as an advisory body to its Member States in the field of international law and I have greatly enjoyed and profited from our discussions and meetings. Looking back, we have met at least once a year to discuss topical issues. I will fondly remember the advice and insights you provided me and the fruitful discussions that we had and take all of that with me to Geneva.

It is inherent in AALCO’s nature to be inclusive and not exclusive. So allow me also to extend a warm welcome to those among you who have come this afternoon even though you might – because of the geographic location of your country – not be a Member of AALCO.

In order to start our discussion, let me say a few words about three areas: - firstly, the nature of my job as Legal Counsel of the United Nations; secondly, the vision of my Office in terms of both providing legal advice across the UN system and in promoting the further development and understanding of international law more generally; and thirdly, I'll discuss a number of current issues which we are dealing with.

[The Role as Legal Counsel]

Over the years, the UN has seen periods of great advancement in international law and jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. Since joining the Organisation, it has become clear to me that international law - and the role of the UN as its champion - is central to the work of the UN and to the Secretary-General and his team.

We live in an era in which international law is no longer only the business of international courts and institutions. We can all see that international law issues are increasingly being considered by national and regional courts – sometimes in sustained, systemic ways; on other occasions in *ad hoc* or more random ways. I am firmly of the view that we should not underestimate the importance of this evolution.

[Vision]

As the Legal Counsel, my task is to support the Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for war crimes, crimes against humanity, genocide and other serious violations of international human rights law. This topic, in one way or another, permeated my activities on a daily basis.

My office plays a key role in promoting the rule of law at the national and international levels, and this is at the heart of the UN's mission. Establishing respect for the rule of law is fundamental and

essential for a number of reasons, including firstly: prevention of conflict; secondly, achievement of a durable peace in the aftermath of conflict; thirdly, the effective protection of human rights; and also, of course, sustainable economic progress and development.

[Current Legal Issues]

What are some of the major legal issues that we are dealing with? What were some of the key issues we dealt with during my tenure? Let me start with the UN's work to end impunity for international crimes.

[The UN's work to end impunity for international crimes]

Under the leadership of the Secretary-General, the UN has achieved significant progress in the fight against impunity in respect of international crimes. Secretary-General BAN Ki-moon has consistently called for the enhancement of accountability for those who commit international crimes, including for serious violations of human rights and international humanitarian law.

In this respect, I would like to refer to the work of the various international justice mechanisms, which we assist and support. The 1990s and the early 2000s were historic periods in international criminal justice, when new international criminal tribunals were established to ensure accountability for genocide, war crimes and crimes against humanity. The first tribunals were the ICTY and the ICTR, established to address accountability for the terrible atrocities of the Former Yugoslavia and Rwanda respectively. These were followed by the SCSL and the ECCC. The international criminal tribunals have reaffirmed, and continue to reaffirm, the central principle established long ago in Nuremberg: that those who commit, or authorize the commission of, war crimes and other serious violations of international humanitarian law are individually accountable for their crimes and will be brought to justice, in accordance with the due process of law.

This leads me to the centrepiece of our system of international criminal justice – the International Criminal Court. The UN supports

the ICC. And we take that responsibility seriously. However, I take every opportunity to emphasise the role of the States. The principle of complementarity is essentially the duty of States first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations of international humanitarian law and human rights law. It is clear that the primary role of national jurisdictions and the principle of complementarity has become the bedrock of international criminal justice. International mechanisms are **not** substitutes for national mechanisms. In the final analysis, **justice is a nation's choice.** Supporting the principle of complementarity through fortifying national judicial systems is a priority in our common fight against impunity for the coming years. But, as we know, where States are unable or unwilling to ensure justice for international crimes, it falls unto international justice to fill the gap.

The International Criminal Court is at the center of efforts of the international community to ensure accountability and end impunity while also seeking to strengthen the rule of law. This Court provides the opportunity and the vehicle for our generation to significantly advance the cause of justice and, in so doing, to reduce and prevent unspeakable suffering. When the ad hoc tribunals have finished their mandates, the ICC will remain as the world's only permanent court which administers international criminal justice.

There are many instructive lessons to be drawn from the UN's work to end impunity for international crimes. Allow me to summarize them as follows:

- The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability;
- In this new age of accountability nobody is above the law, including in particular Heads of State. Leaders will eventually be held accountable for their actions;
- Sovereignty as a barricade against international justice is gone;

- And: there is no peace without justice. Peace and justice must go hand in hand and elements of justice must be factored into every post-conflict strategy in order for peace to be sustainable.

[Current Legal Issues]

Let me now say a few words about the major legal issues we are dealing with.

[DRC]

In March, the Security Council decided to strengthen the peacekeeping operation in the **Democratic Republic of the Congo** — MONUSCO — by creating a special “Intervention Brigade”, with the objective of preventing the expansion of the armed groups operating in the east of the country, neutralizing them and forcibly disarming them. The first soldiers recently arrived in Goma. Perhaps the mere threat of the Intervention Brigade will be enough to persuade some armed groups to lay down their arms and disband. But, in all probability, we can anticipate that the Intervention Brigade will be mounting targeted offensive operations against armed groups in the eastern DRC within a few months. And, with that, MONUSCO will, in all probability, become a party to the armed conflict in that country.

This will have a whole range of legal consequences for the United Nations. Most importantly, international humanitarian law will apply to MONUSCO’s operations. My Office has been addressing the resulting issues – drafting appropriate rules of engagement; preparing procedures for the treatment of members of armed groups who are captured by MONUSCO; and so on. And we will have a situation for the first time where UN peacekeepers will be under the careful watch of the Prosecutor of the ICC, as the Court has jurisdiction over the situation in the DRC.

[Mali]

In April, the Security Council adopted a resolution establishing a United Nations peacekeeping operation in **Mali**: “MINUSMA”. The

African-led operation in Mali, "AFISMA", continued its operations until 1 July. AFISMA's mandate came to an end and MINUSMA commenced operations, with appropriate military and police personnel of AFISMA being "re-hatted" as UN peacekeepers. When MINUSMA commenced operations, the problem of terrorist, extremist and armed groups in Mali has not disappeared. If French forces will have done much to degrade the capabilities of the terrorist and extremist groups that formerly controlled the north of the country, the groups will nevertheless remain a problem. As the United Nations operation deploys to secure key population centres in the north and the communication routes between them, they will in all probability face the threat of a return by armed elements.

My Office is assisting the military planners and the Department of Peacekeeping Operations to define, in the light of the Security Council's resolution, what actions our peacekeepers will be able to undertake in order to deter this threat and prevent the return of armed elements to the north's major cities and towns. Again, we are helping draft appropriate rules of engagement for our soldiers, directives for our police, procedures for detention and so on. And, again, the situation in Mali is one that falls within the jurisdiction of the ICC.

[Kenya]

Allow me to say a few words on the situation in **Kenya**. The presidential elections in March resulted in the election of President Kenyatta and his Deputy, Mr Ruto. Both individuals are subject to summonses of the ICC for crimes against humanity, allegedly committed during post-election violence in 2007-2008.

My Office has consistently advised that all contacts between UN officials and persons who are indicted by international jurisdictions be limited to those which are strictly necessary for the carrying-out of essential UN-mandated tasks. This also follows the Organization's international legal obligations pursuant to the Relationship Agreement between the United Nations and the ICC.

Kenyatta and Ruto appeared voluntarily in The Hague in April 2011, in response to summonses from the ICC to appear. Since then, both individuals have cooperated with the ICC. In light of this, my Office advised that it would not undermine the authority of the ICC, and so would not be inconsistent with the Organization's obligations, if UN officials were to continue to engage with Kenyatta and Ruto and to have normal contacts with them. However, should Kenyatta and Ruto decide to cease cooperating, my Office advised that the "essential contacts policy" should immediately apply; and it would be legally necessary for the Organization's officials to limit their contacts with Mr. Kenyatta or Mr. Ruto to those strictly required for carrying out essential UN-mandated activities. Our internal guidance on this matter has recently been published as official UN documents.

[Syria]

The conflict in Syria has entered its third year. Both the Government and the opposition continue to pursue their goals through aggression. The mounting death toll and destruction is shocking. In the early stages of the conflict, the Secretary-General's Advisors on the Prevention of Genocide and R2P warned that "the widespread and systematic attacks on civilians could constitute crimes against humanity". The situation has long reached the threshold of a non-international armed conflict, and thus the acts of violence against civilians would amount to the commission of war crimes.

The Secretary-General is very much engaged with regard to the situation in Syria. On 21 March he announced his decision to launch a United Nations investigation into the allegations of the use of chemical weapons in Syria. Over the course of the last months we have been working intensely with the Organization for the Prohibition of Chemical Weapons (OPCW) and the World Health Organization (WHO). We are addressing issues like: the overall mandate, mission composition, and operational conditions including safety and security. We face many challenges – not least of which is the necessary cooperation of the Government of Syria. You will have seen the Secretary-General's statement yesterday welcoming the offer of the Government of Syria to continue discussions on the United Nations Mission to Investigate

Allegations of the Use of Chemical Weapons in the Syrian Arab Republic and expressing his hopes that Syria will grant access to the Mission to conduct its comprehensive on-site investigation.

We hope that the mission will contribute to ensuring the safety and security of chemical weapons stockpiles in the country. We also hope that it will serve as deterrence for future possible uses of such weapons. It will be important that this investigation mission receives full cooperation from all parties, including unfettered access.

[HRDDP]

Finally, let me mention a topical issue on which my Office has worked hard over the past few years and is now seeing its labours bear fruit: the so-called “**human rights due diligence policy**”. This will take us back to the DRC. The UN has increasingly been called upon to provide support to non-UN security forces, be it building the operational capacity of national military and police forces, providing logistic support to peacekeeping forces deployed by regional organizations or even conducting joint police or military operations with such forces. Clearly, the law sets down limits on whom we can support and when. That law comes directly from the Charter. My Office developed the human rights due diligence policy in response. The policy essentially consists of three elements. **First**, the UN cannot provide support to non-UN security forces where there are substantial grounds for believing there is a real risk of those forces committing grave violations of international humanitarian, human rights or refugee law. **Secondly**, where grave violations are committed by non-UN security forces that are receiving support from the UN, the UN must intercede with a view to bringing those violations to an end. And **thirdly**, if, despite such intercession, the situation persists, the UN must suspend support to the offending forces.

The Secretary-General issued the policy in 2011 and it was made public in January this year. Member States appear to have embraced it. The Security Council has already endorsed it and asked the Secretary-General to apply it in three resolutions, on Somalia, the DRC and now Mali. And we can see the practical effects of the policy in the

Democratic Republic of Congo. For example, it was widely reported when the Congolese government had suspended 12 senior officers of the Congolese army and initiated judicial investigations against them, in response to allegations of mass rape in the Goma region last November. This was a result of pressure from the UN, which had warned the Congolese army that peacekeepers would refuse to conduct operations with two battalions unless the government prosecuted soldiers accused of mass rapes. The Congolese government's action is a welcome development, which demonstrates that the application of the policy can reinforce cooperation between the UN and Member States to achieve greater respect for international humanitarian law and human rights.

[Conclusion]

This brings me to the end of my remarks today.

As I already mentioned, this is my last meeting with you as Legal Counsel of the United Nations. In September, I will be starting my new role as Irish Permanent Representative to the UN in Geneva. So let me already at this point wish you all the best for the future and I am sure that my successor will build on the solid relationship that exists between OLA and AALCO.

I look forward to hearing your comments on the issues I touched upon or on other legal issues that you may wish to discuss with me. Also, I will be happy to answer any questions that you might have.

Thank you very much for your kind attention.

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